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No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1968

CORNELIUS FULLBRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

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Petitioner was indicted in the United States District Court for the Western District of Oklahoma and, after waiving a jury trial, was convicted by the court on all five counts, namely, (1) possessing and controlling two unregistered stills and distilling apparatus, (2) carrying on the business of a distiller without giving bond, (3) making mash fit for the production of distilled spirits on premises which had not been properly designated for that purpose, (4) transporting and possessing 74 gallons of distilled liquor in contain-

ers to which revenue stamps had not been affixed, and (5) possessing property and liquor intended for use in violation of liquor laws and regulations, in violation of 26 U.S.C. 5179(a), 5205(a)(2), 5601(a)(1), (4) and (7), 5604(a)(1) and 5686(a) (R. 1-3). He was sentenced to imprisonment for three years on count 1; sentence on the remaining counts was suspended and petitioner placed on probation for three years, to commence upon release from serving the sentence on count 1 (R. 13, 22). The court of appeals affirmed (Pet. App. A. i-viii).

Petitioner's sole contention in this Court—an issue raised for the first time in this case in a supplemental brief following oral argument in the court of appeals—is that the evidence does not sustain his convictions. While this claim of insufficiency of evidence would in no event merit plenary consideration by this Court, the court of appeals' determination that the evidence was adequate is clearly correct.[1]

At the beginning of his trial, petitioner's retained counsel stated (R. 34):

> Your Honor, in this matter we will concede all the facts in the matter and would like to offer in evidence our testimony at the Motion to Suppress and a diagram of the property and a deed to the property.
>
> We have no further matters in connection with this, and we would stipulate to whatever the District Attorney wants to do as far as the facts of the still and the various other items.

[1] The court below observed that the untimeliness of the claim would be fatal, but nevertheless went on to find the evidence sufficient (Pet. App. A. viii).

We would like to reserve our rights on the Motion to Suppress.

He further stated that he was asking the court to reconsider his previously litigated motion to suppress as a defense on the merits (R. 35).

The testimony adduced on the motion to suppress consisted solely of the testimony of Wheeler, an Alcohol and Tobacco Tax Unit investigator. Wheeler testified that, at about 8:00 p.m. on April 6, 1967, he and investigator Carpenter were using binoculars to observe a shed on the premises of co-defendant Marzett. A 1957 Ford and a 1964 or 1965 Chevrolet pickup truck drove to the shed. When the shed door was opened, Wheeler could see inside; he observed petitioner and Marzett, with whom he was acquainted, and co-defendant McLaurin. He was also able to see a still in operation. Petitioner and McLaurin loaded the 1957 Ford, and both vehicles left the premises at about 9:00 p.m. Wheeler and Carpenter followed in their own car for several miles and then stopped both vehicles, which were traveling about ten yards apart, McLaurin in the Ford, petitioner and Mrs. Marzett in the Chevrolet. All were placed under arrest and the two vehicles searched. In the Ford were 74 gallons of whiskey. A warrant for the search of the Marzett premises was obtained shortly before midnight (R. 46-52).

The parties stipulated to a chemist's report showing that three samples of whiskey and mash, found at the premises and in the Ford, consisted of one-half pint of fermented mash fit for distillation, alcoholic content 7.7%, one half pint of uncolored moonshine

whiskey, alcoholic content 89.3 proof and one-half pint of the same, 107.5 proof (R. 35-36, 41). It was further stipulated that Carpenter would testify substantially in the same manner as Wheeler had; would further testify that a search of petitioner at the time of his arrest disclosed a key which fitted the trunk of the Ford in which the 74 gallons of whiskey were found; and that one of the keys from the key ring which was taken from the ignition of the Ford fitted the shed on the Marzett premises (R. 36-37). Two other investigators, it was stipulated, would testify as to their observation of the occurrences at the time of arrest, that there were no signs at the premises and no strip stamps attached to the spirits (R. 36, 38). The case was submitted for the court's decision without argument; petitioner asked only to be allowed to submit a brief in support of his motion to suppress. In this context, the court below was fully justified in finding the evidence sufficient to establish guilt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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